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In the Supreme Court of the United States

OCTOBER 1993 TERM

TFL, INC. and CENTRAL TRANSPORT, INC.,
jointly and severally,
PETITIONERS,

vs.

JOHN WALHOUT, Trustee of
Tucker Freight Lines, Inc.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION AND ISSUE A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT BECAUSE THAT COURT, IN NOT ASCERTAINING AND APPLYING INDIANA LAW, HAS DEPARTED FROM THE ACCEPTED AND NORMAL COURSE OF JUDICIAL PROCEEDINGS OR SANCTIONED SUCH A DEPARTURE BY THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN AND THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

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OPINIONS AND ORDERS ISSUED BY THE BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

- The May 13, 1993, Sixth Circuit Court of Appeals Order denying Central Transport, Inc.'s petition for rehearing is set forth in Appendix A.
- The April 15, 1993, Opinion of the United States Court of Appeals for the Sixth Circuit is set forth in Appendix B.
- The March 25, 1992, Opinion of the United States District Court for the Western District of Michigan is set forth in Appendix C.
- The October 25, 1991, Opinion And Order of the United States Bankruptcy Court for the Western District of Michigan is attached as Exhibit D.

JURISDICTION OF THE UNITED STATES SUPREME COURT

This petition is filed pursuant to 28 U.S.C. §1254. The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 15, 1993. Rehearing was denied by that court on May 13, 1993. Jurisdiction of this Court is invoked pursuant to Sup. Ct. R. 10.1, which, in relevant part, provides that this Court will issue a writ of certiorari:

> When a United States court of appeals has ... so far departed from the accepted and normal course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Sup. Ct. R. 10.1 (a) (1990) (emphasis added).

By affirming the decisions of the United States Bankruptcy Court for the Western District of Michigan (the "Bankruptcy Court") and the United States District Court for the Western District of Michigan (the "District Court"), the United States Court of Appeals for the Sixth Circuit (i) did not ascertain or apply applicable Indiana rules of contract interpretation, (ii) failed to follow the decision of an intermediate appellate state court or (iii) in the absence of a definitive ruling from the Indiana Supreme Court, did not accurately rule on the contract issues presented in the way the Indiana Supreme Court would rule.

STATEMENT OF THE CASE

On April 27, 1984, the Bankruptcy Court entered an Order providing for the auction sale of Tucker's rolling stock and other business assets on June 5th through 8th of 1984. Among the items sold at the auction was Tucker's Intrastate Operating Authority No. 296-A9 (the "Intrastate Authority").

On June 5, 1984, Larry Mason, an officer of Petitioner Central Transport, Inc., attended the auction and successfully bid for the Intrastate Authority. On the same day, Mason and Richard Remes, Respondent's predecessor, executed an Agreement for purchase and sale of the Intrastate Authority. In relevant part, the Agreement provided:

> 2. (f) If the transfer of the [Intrastate] Authority cannot be completed within eight (8) months from the date of this agreement, the Buyer has the option to complete the sale at a later date or require that the [deposit] be returned.
>
> * * *
>
> 5. The Buyer agrees, at its expense, to diligently prosecute the application for the transfer of the [Intrastate] Authority, and will use its best efforts to secure such transfer.

Agreement, ¶s 2(f) and 5.

Petitioners[1] retained an attorney to represent them in applying for transfer of the Intrastate Authority to the Public Service Commission of Indiana (the "PSCI"). On or about June 8, 1984, the attorney prepared a PSCI Application For Sale And Transfer Of Common Carrier Certificate Or Contract Carrier Permit (the

[1]Petitioner Central Transport, Inc. is a subsidiary of CenTra, Inc., a Delaware corporation. Petitioner Central is the parent company of Crown Enterprises, Inc., a Michigan corporation; Mohawk Motor, Inc., a Michigan corporation; K.C. Cartage Co. of Kenosha, a Wisconsin corporation; and RW Service System, Inc., an Ontario corporation. Petitioner TFL, Inc. is a subsidiary of Transportation Service, Inc., a Michigan corporation. As used herein, the term "Petitioners" refers to both Central Transport, Inc. and TFL, Inc.

"First Application") which listed Petitioner Central Transport, Inc. as the purchaser.

The First Application was not filed with the PSCI due to a "common control" problem which arose because Petitioner Central Transport, Inc. already had one Indiana intrastate operating authority. "Common control" results when a company is under the management or ownership of another entity. An Indiana statute then in effect, Ind. Code §8-2-7-25, made it unlawful for trucking companies, without prior PSCI approval, from owning and/or managing another trucking company with duplicative authorities.

> It shall be lawful, as provided herein and not otherwise, for two (2) or more common carriers by motor vehicle to consolidate and merge their properties under one (1) ownership, management and operation or for any such carrier or two (2) or more such carriers jointly to acquire control of another such carrier or carriers . . . Such consolidation, merger, and control may be by stock control, lease or purchase.
>
> Before any such consolidation, merger, purchase, lease or stock control is effective, all carriers, persons and corporations interested therein shall apply to the commission and thereupon the commission shall fix a time and place for hearing of such application and cause notice thereof to be given to all parties in interest of the time and place and when and where the same will be heard. If, after such hearing, the commission finds that the proposed merger, consolidation and/or control will be in the public interest, it shall enter an order authorizing such consolidation, merger, purchase, lease or acquisition of control and in such order it shall state the terms and conditions which the commission believes to be just, reasonable and in the public interest.
>
> • • •

Ind. Code §8-2-7-25 (a) and (b).

The "common control" issue was fully disclosed to Respondent by Petitioners' attorney on or about June 18, 1984. On or about the same date, the attorney also informed Respondent that transfer of the Intrastate Authority would likely be hampered by assertions of dormancy. "Dormancy" exists when the purchased trucking authority has not been actively exercised by the seller prior to the sale. The problem of dormancy forces the buyer to treat the transfer of the authority identically to the creation of a new authority and, consequently, make a showing of public need.

To avoid the "common control" and "dormancy" problems, Petitioner Central Transport, Inc.'s attorney formed and incorporated Petitioner TFL, Inc. on June 18, 1984, as a wholly owned subsidiary of Petitioner Central Transport, Inc. On or about June 29, 1984, Petitioners' attorney prepared a second PSCI Application For Sale And Transfer Of Common Carrier Certificate Or Contract Carrier Permit (the "Second Application") which listed Petitioner TFL, Inc. as the purchaser. The Second Application was filed with the PSCI in late June of 1984.

In July and August of 1984, three trucking companies filed protests and complaints with the PSCI with respect to the Second Application. These protests were withdrawn through negotiations over a five month period.

On November 14, 1984, a fourth trucking company, Holland Motor Express, Inc. ("Holland"), submitted a protest to the transfer of the Intrastate Authority. Petitioners were unable to negotiate the withdrawal of this fourth protest.

The PSCI transfer hearing was adjourned four times. The first hearing date, December 19, 1984, was adjourned at Petitioners' and Holland's joint request. Petitioners were prepared to go forward on the second hearing date, April 25, 1985, but a conflict in the schedule of a witness caused Petitioners to request a continuance. The third hearing date, June 28, 1985, was adjourned at the request of Respondent. The fourth date, September 6, 1985, was adjourned at the request of Holland's counsel, who was scheduled to be out of the country. The hearing was rescheduled for October 1, 1985.

As of September 30, 1985, Petitioners did not believe there was a reasonable likelihood that the Intrastate Authority would be transferred or that, if it were transferred, it would be transferred without severe restrictions. Petitioners were advised by their attorney that Holland, the fourth protestant, would never withdraw its protest and that the issues of "common control" raised by Holland would result in the PSCI either (i) denying the transfer outright or (ii) imposing restrictions, at the request of Holland, on the severability of the Intrastate Authority once transferred to Petitioners.

On September 30, 1985, Petitioners elected to withdraw their offer to purchase the Intrastate Authority and invoked their right under ¶2(f) of the Agreement for return of the $77,500.00 deposit. The PSCI never authorized the transfer of the Intrastate Authority or issued an order stating the "terms and conditions which the commission believes to be just, reasonable and in the public interest" as required by Ind. Code §8-2-7-25(a) and (b). *Supra.*

Thereafter, Respondent commenced this Adversary Proceeding in the Bankruptcy Court[2], alleging Petitioners had breached the Agreement by withdrawing on September 30, 1985. The Bankruptcy Court for the Western District of Michigan, Southern Division held a trial on August 31 and September 1, 1988, and, at the conclusion of trial, ruled that Petitioners: (i) had breached the June 5, 1984 Agreement and (ii) were liable for damages. On October 13, 1988, the Bankruptcy Court entered its Final Judgment After Trial and a timely appeal as of right was taken by Petitioners to the U. S. District Court for the Western District of Michigan, Southern Division (the "District Court"). The District Court affirmed the Bankruptcy Court's Final Judgment After Trial. An appeal as of right was taken by

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[2]Jurisdiction in the first instance was based on 28 U.S.C. §1334, an adversary proceeding filed in the Bankruptcy Court. The United States District Court for the Western District of Michigan had jurisdiction over appeals from the Bankruptcy Court pursuant to 28 U.S.C. §158(a). The United States Court of Appeals for the Sixth Circuit had jurisdiction over Petitioners' appeal from the District Court's order affirming the judgment of the Bankruptcy Court pursuant to 28 U.S.C. §158(d).

Petitioners to the United States Court of Appeals for the Sixth Circuit, which, by Order entered April 15, 1991, affirmed in part and reversed and remanded in part.

On remand, the Bankruptcy Court entered its Order again awarding judgment to the Trustee. Petitioners appealed as of right to the District Court, which, on March 25, 1992, entered its Order affirming the decision of the Bankruptcy Court. An appeal as of right was taken by Petitioners to the United States Court of Appeals for the Sixth Circuit, which, by Order entered April 15, 1993, affirmed the rulings of the lower courts. Central filed a petition for rehearing and that petition was denied by the Sixth Circuit on May 13, 1993.

ARGUMENT

REASONS FOR ISSUING A WRIT OF CERTIORARI

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS AS THAT COURT FAILED TO DETERMINE AND APPLY THE CORRECT RULE OF INDIANA CONTRACT LAW

The Sixth Circuit recognized and the parties agreed that the lower courts were required to apply Indiana contract law to resolve the disputes raised in the Trustee's lawsuit. When resolving state law issues, this Court has consistently held that federal district and appellate courts should follow the decision of an intermediate appellate state court in the absence of other persuasive data[3] that the highest court of the state would decide an issue differently. *See e.g. Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940), *West v. American Tel. & Tel. Co.*, 311 U.S. 223

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[3]In *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956), this Court indicated the type of evidence or data which would support a federal court's disregard of an intermediate appellate court rule:

> [T]here appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule.

Bernhardt, 350 U.S. at 205 (1956).

(1940), *Six Cos. of California v. Joint Highway Dist. No. 13*, 311 U.S. 180 (1940), *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940). As this Court opined in *West*:

> There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court.
>
> * * *
>
> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a dictum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

West, 311 U.S. at 236-237. In *Fidelity Union,* this Court opined:

> [I]t is . . . the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. * * * An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.

Fidelity Union, 311 U.S. at 177-179. A writ of certiorari to the United States Court of Appeals for the Sixth Circuit should issue in this case because that Court disregarded two Indiana rules of contract construction: (i) contracts should be interpreted to give meaning to all words, phrases and terms and (ii) a party may not elect an inchoate option.

A. This Court Should Issue A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit As That Court Misinterpreted The Plain Language Of The Agreement.

The Sixth Circuit's errors in the application of Indiana contract law have their genesis in the Sixth Circuit's misinterpretation of the option rights created under the Agreement. Paragraph 2(f), which is the only provision of the Agreement which creates option rights, states:

> If the transfer of the [Intrastate] Authority cannot be completed within eight (8) months from the date of this agreement, the Buyer has the option to (i) *complete the sale at a later date* or (ii) require that the [deposit] be returned.

Agreement ¶2(f) (enumeration and underscoring provided). The terms of ¶2(f) are express and clear. Upon expiration of the initial eight months, Petitioners, at their choice, could either (i) *complete the sale* of the Intrastate Authority *at a later date or* (ii) *withdraw* from the Agreement and demand return of the deposit. Absent the requisite PSCI authorization, *supra*, p. 2, Petitioners could not "complete the sale".

In an attempt to harmonize the perceived conflict between paragraph 2(f)'s option to withdraw and paragraph 5's obligation to diligently pursue the transfer, the Sixth Circuit erroneously interpreted the option right to "complete the sale at a later date" as an option:

- to "continue;" or
- "to pursue diligently the transfer of authority through the Public Service Commission proceeding."[4]

---

[4]The Bankruptcy and District Courts also treated Petitioners' option to complete the sale as if it were elected merely by "proceeding with the transfer." Indeed, no less than fourteen times throughout their opinions, the Bankruptcy and District Courts erroneously referred to Petitioners' election right as an "option to proceed with the transfer application" rather than an election to "complete the sale", which is the express contractual language. *See* Bankruptcy Court Opinion, Appendix "D", pp. 26a, 27a, 28a, 31a, 33a and 34a; and District Court Opinion, Appendix "C", p. 12a.

April 15, 1993, Sixth Circuit Opinion, Appendix "B", pp. 3a-4a. Petitioners respectfully submit that a writ of certiorari should issue in this case because (i) the Sixth Circuit rewrote the Agreement by expunging the option right "to complete the sale at a later date" and (ii) the Sixth Circuit's interpretation directly conflicts with controlling Indiana case law.

B. This Court Should Issue A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit As That Court Failed To Apply Controlling Indiana Case Law Which Holds That Contracts Should Be Interpreted *To Give Meaning To All Words, Phrases Or Terms.*

The Sixth Circuit's interpretation of the Agreement, *supra,* rendered meaningless (i) Petitioners' option right to *complete* the sale, together with the corresponding right to withdraw at a later date, and (ii) the PSCI's jurisdiction to approve the transfer and issue an order setting forth the terms and conditions of the transfer. As such, the Sixth Circuit's interpretation of the Agreement is in conflict with the controlling Indiana decisional law, which holds that Courts should (i) not rewrite contracts and (ii) make all possible attempts to construe contractual language so as not to render any words, phrases or terms ineffective or meaningless. *See Wabash Ford Truck Sales, Inc. v. Ford Motor Co.,* 472 N.E.2d 611, 614 (Ind. App. 1984) (courts can only enforce the terms of the contract as agreed upon by the parties and have no authority to make a new contract); *Estate of Saemann v. Tucker Realty,* 529 N.E.2d 126, 131 (Ind. App. 1988) (court declined to read rights into contract where rights are not specifically provided for in contract); *Evans v. National Life Accident Ins. Co.,* 467 N.E.2d 1216, 1219 (Ind. App. 1984) (court cannot rewrite contract for parties and plainly expressed exceptions, exclusions and limitations are entitled to construction and enforcement); *Bush v. Washington Nat'l Ins. Co.,* 534 N.E.2d 1139, 1143 (Ind. App. 1989) (court cannot rewrite contract and will make all possible attempts to construe contract so as not to render any words, phrases or terms meaningless); and *Holtzclaw v. Bankers Mutual Ins. Co.*, 448 N.E. 2d 55, 59 (Ind.

App. 1983) (court cannot rewrite contract so as to render words, phrases or terms meaningless).

This Sixth Circuit's failure to apply the foregoing rules of Indiana contract construction constituted a material error of law which required reversal of the Bankruptcy and District Courts' judgments and entry of judgment in Petitioners' favor.

C. This Court Should Issue A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit As That Court Did Not Follow An Indiana Decision, *Haney v. Estate of Denny*, Which Holds That A Party May Not Exercise Inchoate Option Rights.

Petitioners argued below that they could not exercise their option to "complete the sale [of the Intrastate Authority] at a later date" unless and until they received approval of the transfer of the Intrastate Authority from the PSCI. The Sixth Circuit's affirmance of the lower court's rulings that such an election did occur by merely continuing the PSCI transfer process is premised on the flawed notion that Petitioners elected an option right which had not yet accrued or ripened. The courts of Indiana have expressly rejected such a premise. The Sixth Circuit, obligated to ascertain and apply Indiana law, should have rejected such a contention as well.

Indiana law expressly provides that an option may not be exercised before it ripens into a legal right. *See Haney v. Estate of Denny*, 193 N.E.2d 648 (1963). The facts of *Haney* are as follows. In April of 1955, appellant Troy Haney leased certain real property from Noble and Gladys Denny. The terms of Haney's lease provided Haney with a non-assignable option to purchase the property during, *but not before,* 1960. *Haney, supra,* 193 N.E. 2d at 649. Pursuant to an eminent domain statute, the State of Indiana condemned the leased property in January of 1958. *Id.* at 649. Thereafter, appraisers evaluated the damages to all interested parties, including Haney and the Denny's. *Id.* at 649. The Boone County Circuit Court entered a judgment based on the findings of the appraisers. Haney appealed the judgment to the Indiana Court of Appeals.

In his appeal, Haney argued that he was entitled to a greater percentage of the eminent domain damages (specifically, from the portion awarded to reimburse the fee interest held by the Dennys) because he had validly exercised his option to purchase the real property. The Indiana Court Of Appeals, finding that Haney could not exercise an option which had not yet ripened, rejected Haney's argument.

> Appellant contends that certain damages awarded to Appellees in the condemnation proceedings should have been awarded to him and to advance his reasoning in this respect he asserts an ownership in the real estate and personal property based on the option to purchase. A lease of real estate with an option to purchase, and *particularly where the option has not ripened,* as in the case at bar, does not create in the lessee and future optionee an interest in the property upon which recovery may be had after the same has been taken by eminent domain.

Id. at 654 (Emphasis added).

Haney's option right to purchase the real property had not ripened because he was contractually forbidden from exercising the option to purchase the real property until 1960. A similar prohibition prevented Petitioners from exercising their option right to "complete the sale [of the Intrastate] Authority at a later date" as of September 30, 1985 (the date petitioners requested return of their purchase money deposit). Petitioners' option to "complete the sale" had not ripened simply because they were contractually and legally forbidden from *completing* the sale before the PSCI approved the transfer. *Supra*, p. 2. Therefore, Petitioners did not and could not unalterably elect to "complete the sale" by proceeding with the transfer after February 5, 1985. Because Petitioners could not and had not made an election of their reciprocal rights under ¶2(f), they were free to elect to withdraw from the Agreement on September 30, 1985. Therefore, this Court should issue a writ of certiorari, reverse the judgment of the Sixth Circuit and order that judgment be entered in favor of Petitioners.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of appeals for the Sixth Circuit.

Respectfully submitted,

DYKEMA GOSSETT

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Dated: August 11, 1993

APPENDICES

APPENDIX A

Case No. 92-1546
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

IN RE: TUCKER FREIGHT LINES, INC.

JOHN WALHOUT, Trustee
Plaintiff — Appellee

v.

CENTRAL TRANSPORT INC.; IFL, INC.
Defendants — Appellants

BEFORE: MERRITT, Chief Judge; GUY and RYAN, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
(s) Leonard Green,
Clerk

Filed May 13, 1993

APPENDIX B

NOT RECOMMENDED FOR PUBLICATION

No. 92-1546

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re TUCKER FREIGHT LINES INC., Debtor.

JOHN R. WALHOUT, Trustee,
Plaintiff-Appellee,

v.

TFL, INC. and CENTRAL TRANSPORT, INC.,
jointly and severally,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Western District of Michigan.

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

Before: MERRITT, Chief Judge; GUY and RYAN, Circuit Judges.

MERRITT, Chief Judge. Defendants, TFL, Inc. and Central Transport, Inc., affiliated companies, appeal a final district court order affirming judgment against them in the bankruptcy court. The case raises a contract interpretation issue concerning the right of defendants to withdraw from a contract with the plaintiff, the bankruptcy Trustee. On a previous appeal, we remanded the case for further findings and conclusions.

Central Transport successfully bid for the debtor's authority to operate as a commercial carrier in Indiana at an auction conducted by the trustee for the debtor in June of 1984. Central bid $310,000 for the authority; the next highest bid was $300,000. The bid contemplated a licensing proceeding before the Indiana Public Service Commission to permit the transfer of the debtor's

authority to the buyer. At the conclusion of the bidding, Central Transport signed a contract to purchase the authority which contained the following provisions:

> 2. * * *
>
> (f) If the transfer of the Authority cannot be completed within eight (8) months from the date of this agreement, the Buyer has the option to complete the sale at a later date, or require that the payment described above be returned.
>
> * * * *
>
> 5. The Buyer agrees, at its expense, to diligently prosecute the application for the transfer of the Authority and will use its best efforts to secure such transfer.

The eight month deadline in paragraph 2(f) was on February 5, 1985. Central demanded return of its money and requested dismissal of transfer proceedings before the Indiana Public Service Commission on September 30, 1985, the day before the final hearing on the transfer of the authority. The Trustee then sued Central for breach of contract and recovery of the full contract price. The bankruptcy court, affirmed by the district court, found that the contract in question did not contemplate an unlimited right of withdrawal at any time after the initial period expired on February 5, 1985.

We agree with the two courts below that the buyer breached its purchase agreement by withdrawing from the sale on the eve of trial before the Public Service Commission in Indiana. The agreement signed by the parties provides in somewhat inconsistent language both that the buyer may withdraw from the sale after eight months and must diligently pursue the transfer of the operating authority through the administrative proceedings. Taking into account the overall purpose of the agreement to effectuate the buyer's bid at the auction and its agreement to pursue

diligently the transfer of the authority, we believe that the withdrawal provision in § 2(f) means the buyer had a reasonable period of time after the initial deadline period expired in which to exercise its option to withdraw. The contract does not give the buyer an indefinite or open-ended period to withdraw. The buyer should not have waited for a period almost as long as the initial deadline period to exercise its option to withdraw or continue. For seven months the buyer took no action to exercise its option under §2(f). The buyer's obligation was either to exercise its option to withdraw within a relatively short period of time after the initial period expired or to pursue diligently the transfer of authority through the Public Service Commission proceeding. The interests of the bankruptcy estate, as well as the interests of other potential bidders, could be severely prejudiced by a long period of delay. Shortly after the initial period expired the buyer should have assessed its situation and notified the seller of its intention to withdraw.

Accordingly, the judgment of the district court is AFFIRMED.

Filed April 15, 1993

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:

TUCKER FREIGHT LINES, INC.,
Debtor.

Bankruptcy Court
File No. HK-83-02391
Adv. Pro. No. 85-0767

File No. 1:91-CV-1035

Hon. Benjamin F. Gibson

JOHN WALHOUT,
Plaintiff/Appellee,

v.

TFL, INC. and CENTRAL TRANSPORT INC., jointly and severally,
Defendants/Appellants.

OPINION

TFL, Inc. and Central Transport Inc. (jointly "appellants") appeal from the October 25, 1991, Opinion on Remand of the bankruptcy court which found that appellant Central Transport Inc. breached a contract to purchase an asset of the debtor Tucker Freight Lines, Inc. ("Tucker") and awarded damages to the trustee, John Walhout ("appellee"). The case was originally tried on August 31 and September 1, 1988. The bankruptcy court found in favor of appellee, and appellants appealed to this Court. This Court affirmed the bankruptcy court's decision by Opinion and Order dated January 17, 1990. Appellants appealed to the Sixth Circuit which affirmed in part, reversed in part, and remanded to the bankruptcy court for further proceedings. In its Opinion on Remand, the bankruptcy court again found in favor of appellee. Appellants raise four issues on appeal:

Appendix C

1. Did the bankruptcy court err in concluding that Central Transport, Inc. failed to exercise its right to terminate the agreement within a reasonable time?

2. Did the bankruptcy court err in finding that Central Transport, Inc. by its conduct exercised its option to "complete the sale at a later date"?

3. Did the bankruptcy court err in finding that Central Transport, Inc. had surrendered its ability to exercise those rights conferred upon it pursuant to paragraph 2(f) of the agreement?

4. Did the bankruptcy court err in finding that Central Transport, Inc. did not have the right to terminate the agreement assuming, *arguendo*, it had exercised the option of completing that sale at a later date?

Appellants' Brief at 1. For the reasons stated below, the decision of the bankruptcy court is affirmed.

I.

On September 13, 1983, Tucker filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Until January 14, 1984, Tucker operated as a debtor in possession. On that date, Richard Remes was appointed Chapter 11 operating trustee. On December 13, 1984, the bankruptcy was converted to a Chapter 7 proceeding and appellee was appointed trustee. At a court ordered auction conducted from June 5th through June 8th of 1984, all of the assets of Tucker were sold. Among the items sold at auction was Tucker's Indiana Operating Authority (the "intrastate authority" or "authority").

The intrastate authority was sold to Larry Mason, an officer of Central Transport Inc., for a high bid of $310,000.00. On the day of the sale, Mason executed a purchase agreement with appellee. The agreement called for a down payment of 25% of the purchase price ($77,500.00). That amount was paid immediately

and is still held by appellee. The contract also contained the following two provisions at paragraphs 2(f) and 5 governing the transfer of the intrastate authority from Tucker to appellants[1]:

> 2(f). If the transfer of this Authority cannot be completed within eight (8) months from the date of this agreement, the Buyer has the option to complete the sale at a later date, or require that the payment described above be returned.
>
> 5. The Buyer agrees, at its expense, to diligently prosecute the application for the transfer of the Authority and will use its best efforts to secure such transfer.

Various objections were filed with the Public Service Commission of Indiana ("PSCI") with respect to the application for transfer. Overland Transportation System, Inc., Overnite Transportation Company, and Holland Motor Express, Inc. all filed objections to the transfer raising issues of duplication, dormancy, and common control.[2]

The bankruptcy court determined, and the parties agree, that the strategy devised to accomplish the transfer was one of delay. TFL was able to obtain temporary operating authorities. Apparently, by building up traffic under a temporary authority, appellants increased the possibility that they could overcome the objections raised before the PSCI. There is evidence in the record

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[1]At the time of the agreement, Central Transport was the purchaser of the intrastate authority. On June 18, 1984, TFL, Inc. was formed as a wholly owned subsidiary of Central to facilitate the transfer of the authority. TFL, Inc. apparently replaced Central Transport as the buyer under the agreement. The Court need not determine which entity in fact was bound by the purchase agreement however. The Sixth Circuit Court of Appeals has previously determined that "Central is responsible, as buyer, for any liability which the trial court determines on remand to be remaining under this contract." *Walhout v. TFL, Inc. (In re Tucker Freight Lines)*, No. 90-1244, slip op. at 1 (6th Cir. April 15, 1991).

[2]Duplication results when two entities under common control have identical operating authorities; common control results when a company is under the management or ownership of another entity; and dormancy exists when the purchased authority was not exercised by the seller prior to acquisition.

of correspondence and testimony from Alki Scopelitis, an attorney hired by appellants to accomplish the transfer, to the effect that delay was in the interest of both appellee and appellants because it would smooth the road toward transfer of the authority.

The hearing before the PSCI was ultimately delayed until October 1, 1985. However, on September 30, 1985, TFL elected to exercise its right under paragraph 2(f) of the agreement to require return of the down payment and to terminate the contract. On October 1, 1985, TFL moved to withdraw its application for transfer of the authority and to dismiss the proceedings before the PSCI. TFL's motion to withdraw was granted and the trustee ultimately resold the intrastate authority for $5,000.00. He subsequently commenced this adversary proceeding in the bankruptcy court. After a two-day trial, the bankruptcy court held for appellee, finding that appellants improperly withdrew from the purchase agreement and they were obligated to appellee for the purchase price of the intrastate authority. The court reasoned that the doctrines of waiver and laches precluded appellants from prevailing.

In reversing that decision, the appellate court found that resolution of the case involved an interpretation of paragraphs 2(f) and 5 of the agreement and that there were insufficient findings of fact and conclusions of law set out by the bankruptcy court to determine whether the contract had been breached. It remanded with the instruction that the bankruptcy court prepare written findings and conclusions addressing the following:

> Is paragraph 5 a condition precedent to paragraph 2(f)? If so, was the condition met so that Central had the right to exercise paragraph 2(f)? If Central had the right to exercise 2(f), what was the time in which it had to exercise its option under 2(f)? Did it exercise its option to complete the sale under that paragraph by continuing to seek approval for the transfer after February 5, 1985? If not, did Central's notice of

termination on September 30, 1985 constitute notice within a reasonable time?

If paragraph 5 is not a condition precedent or was satisfied, so that Central had the right to exercise the options contained in paragraph 2(f), what was the time in which it had to exercise its option under 2(f)? Did it exercise the option to complete the sale by continuing to seek approval for the transfer after February 5, 1985? If not, did Central's notice of termination on September 30, 1985 constitute notice within a reasonable time?

And finally, based on the above analysis, what obligations remain enforceable under the contract?

Slip Op. at 4.[3]

As to the first set of questions, the bankruptcy court determined that paragraph 5 was not a condition precedent to paragraph 2(f). The court then concluded that appellants had a "reasonable time" within which to exercise their option under paragraph 2(f). The court found that appellants did not exercise their option to reject the agreement within a reasonable time and that, in any event, by continuing to seek approval of the transfer after February 5, 1985, appellants exercised their option to complete the sale at a later date which precluded them from exercising the option to reject the agreement. Finally, the bankruptcy court determined that appellants were in breach of contract and awarded damages in the amount of $227,500.00.

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[3]February 5, 1985, is a date of key importance because it falls eight months after Mason executed the purchase agreement on behalf of Central Transport. Paragraph 2(f) gives appellants the right to exercise their option to reject the agreement if transfer cannot be accomplished after eight months. The bankruptcy court determined that the right to terminate was perfected on February 5, 1985.

Appendix C

II.

A bankruptcy court's factual findings shall not be set aside unless clearly erroneous. Bankruptcy Rule 8013. However, the bankruptcy court's legal conclusions, or mixed determinations of law and fact, are subject to *de novo* review. *In re Caldwell*, 851 F.2d 852 (6th Cir. 1988).

III.

The parties agree that the bankruptcy court was correct in concluding that performance under paragraph 5 was not a condition precedent to appellants exercising their rights under paragraph 2(f). Likewise, they agree that the amount of time appellants had to exercise their right to cancel the agreement was a reasonable time after February 5, 1985. *See First Federal Savings Bank v. Key Markets, Inc.*, 559 N.E.2d 600 (Ind. 1990). "What constitutes a reasonable amount of time depends on the subject matter of the contract, the situation of the parties and the circumstances attending performance. *Fraternal Order of Police Lodge No. 52 v. Elkhart*, 551 N.E.2d 469, 472 (Ind. App. 1990); *Jay Clutter Custom Digging v. English*, 393 N.E.2d 230, 232 (Ind. App. 1979). Reasonable time was defined by the court as the "time sufficient to determine which option right to exercise." Opinion on Remand at 23. This definition is appropriate. It gives meaning to paragraph 2(f) while foreclosing the possibility that appellants could rely on that paragraph indefinitely to terminate the contract at any time.

The trial court's determination that appellants did not act within a reasonable time is a determination of fact. *Bond v. Peabody Coal Co.*, 450 N.E.2d 542, 547-48 (Ind. App. 1983) (whether contract performance has been accomplished "forthwith" is question of fact); *Construction Associates, Inc. v. Peru Community School Bldg. Corp.*, 393 N.E.2d 792, 796 (1979) (whether extension of time under contract is reasonable is question of fact for trial court); *Misco Inc. v. U.S. Steel Corp.*, 784

Appendix C

F.2d 198, 203 (6th Cir. 1986) (determination of what constitutes reasonable time is fact specific inquiry). The record supports the court's finding that as of February 5, 1985, appellants were apprised of all the necessary information to decide whether to withdraw from the agreement or to complete the sale at a later date. Appellants knew of the objections raised before the PSCI and they had mapped out a strategy to deal with those objections.[4] Scopelitis continued to seek approval of the transfer on behalf of appellants. The parties were situated such that appellee had a similar interest in appellants' strategy of delay. It was in appellee's interest for the parties to work together to accomplish the sale of the intrastate authority. The circumstances surrounding performance also were such that after February 5, 1985, appellee was entitled to know for certain that the sale was to be completed at a later date. Again, to interpret paragraph 2(f) reasonably, there must have been some limit on appellants' right to withdraw. They could not delay that ultimate decision indefinitely. *See* Corbin on Contracts § 96, n. 15. Likewise, time is of the essence in exercising an option to terminate a contract. *Romain v. A. Howard Wholesale Co.*, 506 N.E.2d 1124 (Ind. App. 1987). It was not clearly erroneous for the trial court to hold that by waiting nearly eight months after February 5 to withdraw from the agreement appellants failed to act in a reasonable time.[5]

The court's legal conclusion that choosing one option foreclosed appellants from exercising the other option is sound. The

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[4]By this time the only remaining objection was that of Holland Motor Express, Inc. That objection was still pending at the time that appellants rejected the agreement.

[5]Appellants assert that it was not an unreasonable delay because appellee was not prejudiced. That argument lacks merit under the circumstances of the remand from the appellate court. The bankruptcy court was concerned with the interpretation and application of a contract, not with the application of equitable rules of performance, *e.g.*, laches and waiver. Prejudice to appellee is not a consideration where appellants have "time sufficient to determine which option right to exercise" under the contract. When a sufficient time has passed, further delay becomes unreasonable under the contract, without reference to prejudice to either party.

two alternatives are inconsistent. Within a reasonable time of February 5, appellants could either terminate the agreement or proceed with the sale. They could not do both. Where a party to an option contract elects to perform, the alternative, inconsistent option to terminate is lost. Corbin on Contracts § 264. The trial court found that appellants affirmatively chose to "complete the sale at a later date." By not timely exercising their right to withdraw and still diligently pursuing the transfer application, appellants evidenced their intent to proceed with the sale. This factual finding is not clearly erroneous. The record supports the finding that by not terminating the contract sooner and continuing to pursue the transfer, appellants chose the second option.

Finally, the bankruptcy court's conclusion that by withdrawing from the agreement appellants breached the agreement and appellee is entitled to damages is affirmed. The contract remained in force throughout the time in question. When appellants breached the agreement, appellee attempted to mitigate his damages by selling the authority for $5,000.00. He is entitled to recover the difference between $5,000.00 and $310,000.00, less the $77,500.00 down payment.

IV.

For the reasons stated above, the decision of the bankruptcy court is AFFIRMED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: March 25, 1992

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:
TUCKER FREIGHT LINES, INC.,
Debtor.

Bankruptcy Court
File No. HK-83-02391
Adv. Pro. No. 85-0767

File No. 1:91-CV-1035

Hon. Benjamin F. Gibson

JOHN WALHOUT,
Plaintiff/Appellee.

v.

TFL, INC. and CENTRAL TRANSPORT INC., jointly and severally,
Defendants/Appellants.

ORDER

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 25th day of March, 1992.

PRESENT: HON. BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

In accordance with the Opinion dated March 25, 1992, IT IS HEREBY ORDERED that the decision of the bankruptcy court is AFFIRMED.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

IN RE:

TUCKER FREIGHT LINES, INC.,
Debtor.

Case No. HK 83-02391

JOHN R. WALHOUT, Trustee
Plaintiff.

v.

TFL, INC. and CENTRAL TRANSPORT INC.,
Defendants.

Adversary Proceeding No. 85-0767

COUNSEL:

David Murphy, Pepper, Hamilton & Scheetz 36th Floor, 100 Renaissance Center Detroit, Michigan, Attorney for the Plaintiff.

Simpson Moran by: Patrick A. Moran, Daniel F. Berry, Eric Parzianello 555 South Woodward Fifth Floor Box 3046 Birmingham, Michigan, Attorneys for the Defendants.

OPINION ON REMAND FROM THE SIXTH CIRCUIT COURT OF APPEALS

This dispute was originally before me on August 31, 1988 and September 1, 1988 for a two day trial to consider the breach of contract allegations raised by the Trustee, John Walhout, against the Defendants, TFL, Inc. and Central Transport, Inc. (hereinafter "Central Transport"). At the conclusion of the trial, I found in favor of the Plaintiff and awarded damages in the amount of $227,500.00. On April 15, 1991, the Sixth Circuit Court of Appeals reversed my decision in part and remanded the case to the Bankruptcy Court for the Western District of

Michigan for further consideration of the purchase agreement entered into by the parties. After examining the transcript of the trial, the exhibits provided by each side, and the language of the purchase agreement, I conclude, for the reasons set forth in this opinion, that judgment should still be entered in favor of the Plaintiff in the amount of $227,500.00 Prejudgment interest is awarded from October 1, 1985 at the rate of 8% as allowed by Indiana law. Postjudgment interest will accrue at the rate set forth in 28 U.S.C. § 1961.

FACTS

After submission by the parties of proposed findings of facts and conclusions of law and after reviewing the trial record, the Court finds the facts in this matter to be as follows.

On September 16, 1983, the Debtor, Tucker Freight Lines, Inc. (hereinafter "Tucker") filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Subsequent to the filing of its petition and until January 14, 1984, Tucker operated as debtor in possession. On January 14, 1984, Richard Remes was appointed Chapter 11 operating Trustee of Tucker. Later, on December 13, 1984, John Walhout replaced Mr. Remes as Trustee when the case converted to a Chapter 7 proceeding.

On April 27, 1984, I signed an order providing for the sale of all of the Debtor's rolling stock and other business assets. Disposition of the stock and assets was accomplished by an auction sale conducted from June 5th through June 8th of 1984 by Joyner Auctions, Inc. Among the items sold at the auction were Tucker's Indiana Operating Authority (the "Intrastate Authority") and its interstate operating authority.

Larry Mason, an officer of Central Transport, attended the auction and successfully bid for the Intrastate Authority at the amount of $310,000.00. On the same day as the sale, Mr. Mason executed a purchase agreement with the Trustee. The contract to purchase the Intrastate Authority was written by Mr. David

Davidoff, attorney for the Trustee, Mr. Remes. This was the first time Mr. Davidoff drafted a contract for the transfer of an operating authority in a trucking company. The contract called for an initial payment of 25% of the purchase price (here, $77,500), which was made. The purchase agreement also contained the provisions that are now before me for consideration.

After executing the contract for sale, an application to approve the transfer of the Intrastate Authority was prepared by the Trustee and Central Transport. This application was never filed. Central Transport, through advice of counsel, Alki Scopelitis, learned that it would be difficult, if not impossible, to effectuate a transfer of the Intrastate Authority as a result of trucking authorities already owned by Central Transport.[1] Ultimately, in an effort to avoid the problems with the transfer, Mr. Scopelitis, acting for Central Transport, formed and incorporated TFL, Inc. (hereinafter "TFL") under Indiana law, on June 18, 1984, as a wholly owned subsidiary of Central Transport. As a company, TFL possessed minimal assets and was formed solely as a vehicle for accomplishing the transfer of the Intrastate Authority.[2] In late June, 1984, Mr. Remes and TFL filed an Application to Transfer the Intrastate Authority to TFL. TFL was also substituted for Central Transport as transferee on the purchase agreement. Central Transport remained liable on the contract, however, and was not released from any duties under the contract by the substitution of TFL.[3]

Various protests and complaints were filed with the Public Service Commission of Indiana (hereinafter the "PSCI") with respect to TFL's application for transfer. On July 25, 1984, Overland Transportation System, Inc. filed a complaint against the transfer. Overnite Transportation Company filed a protest with the PSCI in early August, 1984 as did Turner Trucking Company. Lastly, Holland Motor Express, Inc. (hereinafter "Holland") submitted its protest on November 15, 1984. The objections filed against TFL's application raised issues of duplication, dormancy and common control. Duplication is the problem

of two entities, under common control, having identical operating authorities. Common control results when a company is under the management or ownership of another entity. Dormancy exists when the purchased trucking authority was not exercised by the seller prior to acquisition. The problem of dormancy forces the buyer to treat the transfer of an authority as the creation of a new authority and, consequently, make a showing of public need.

The first hearing scheduled before the PSCI, after all protests were filed, was on December 19, 1984. Prior to the hearing, both Overland and Overnite withdrew their objections to the transfer of the Intrastate Authority. Based on the withdrawals, a motion for continuance was filed by Mr. Scopelitis and the December hearing date was postponed until April 25, 1985. By that time, Holland was the only remaining disputant. A series of continuances followed which eventually postponed the hearing date to October 1, 1985. The hearing before the PSCI, set for April 25, 1985, was continued because one of TFL's witnesses was scheduled to appear before the Michigan Public Service Commission during late April. The April 25th hearing was rescheduled for June 28, 1985, but was continued, again, to September 6, 1985 because the Trustee's witnesses were scheduled to appear before this Court. Finally, the September 6, 1985 hearing date was postponed to October 1, 1985 when the attorney for Holland was scheduled a be on a trip outside this country in early September.

Despite the hearing delays before the PSCI, TFL was operating under the Intrastate Authority. During the period from October, 1984 to October, 1985, TFL obtained and maintained temporary operating authority for the intrastate routes. This was accomplished through a series of requests for temporary authority that were regularly filed by TFL and that were always granted.

In response to the protests filed, Mr. Scopelitis and Central Transport developed an approach for accomplishing the transfer of the Intrastate Authority. It seems that through the advice and expertise of Mr. Scopelitis, Central Transport decided that the

problems of dormancy and duplicate authority would lessen the longer TFL operated under temporary authority. Therefore, the Defendants orchestrated, or at least acquiesced in allowing, the hearing delays outlined above.

On September 7, 1984, Mr. Scopelitis wrote to James Payne, Senior Vice-President of Central Transport, explaining that his reason for not immediately addressing the objections filed to TFL's application was that "time was on our side." This statement can only be interpreted to mean that delay in the proceedings would make TFL's position stronger. In another letter dated September 10, 1984, Mr. Scopelitis reiterated the position that "time is on our side" and informed Mr. Payne that temporary operating authority was obtained through February 11, 1985. Just prior to the December hearing date, Mr. Scopelitis again corresponded with Mr. Payne, this time informing the Central Transport executive that he had requested a continuance of the transfer hearing and would seek to get the hearing rescheduled "as late as possible in the spring of 1985."

Mr. Payne and Mr. Lech, both officers of Central Transport, stated at trial that they did not purposefully seek any delay of the proceedings and in fact did not know of any plan or strategy to do so.[4] Mr. Scopelitis testified, through the entry of his deposition, that no one party controlled the speed of the hearing and that he was never told to delay the application process. But, this testimony is contradicted by the correspondence already mentioned and by testimony of Mr. Scopelitis, given as follows, in explaining how the passage of time benefitted TFL's application before the PSCI:

> I think throughout this thing, and I feel compelled to put this on the record at this point, the longer we took in building up the traffic under TFL . . . the better the chances we had of winning the case. . . . If we could show that TFL really operated separately from Central and that it was a separate entity operating in a separate

> fashion, then the Commission, we felt, wouldn't be as prone to impose restrictions.

Transcript Volume II at 169-70. Further testimony was given by Mr. Scopelitis regarding TFL's pursuit of the Intrastate Authority:

> Well, the theme that ran throughout my representation of the transaction is to build up the Tucker authority as much as possible so that it was capable of being sold, and the longer we would get under temporary authority, the more we would build up the traffic in that separate entity, thereby combating the issue of dormancy and combating the issuance of duplication.

Transcript Volume II at 194.

In reviewing all the testimony given, I must conclude that soon after learning of the objections filed, Central Transport, TFL and Mr. Scopelitis decided that it was to their advantage to delay the proceedings. As I mentioned at trial, there was nothing sinister about this, but the record reflects that as part of their effort to obtain approval of the application, it was decided that it would be best to outlast the opposition and build up an operating record under the grant of temporary authority. Despite the comments of Mr. Payne and Mr. Lech to the contrary, I find that both knew of and approved of this approach. The correspondence between the parties reflects this conclusion, as does the testimony of Mr. Scopelitis, noting especially his continual use of the pronoun "we" in his testimony, cited above, when referring to the persons who decided to pursue and knew of the strategy of delay.

As already noted, the hearings before the Commission were delayed until, finally, October 1, 1985. TFL's application never came before the Commission, however. On September 30, 1985, Mr. Lech, as executive vice-president of Central Transport, invoked an option provided under paragraph 2(f) of the purchase agreement and withdrew its offer to purchase the Intrastate

Authority. The transfer hearing before the PSCI was postponed until the end of the month, October 31, 1985.

In response to Central Transport's action, on October 21, 1985, the Trustee, by now Mr. Walhout, commenced this adversary proceeding on behalf of the estate in bankruptcy seeking injunctive relief and damages against the Defendants for breach of contract. Holland withdrew its objection to the application on October 30, 1985. Central Transport still maintained its right to withdraw from the purchase and the PSCI dismissed the transfer proceeding shortly thereafter, at the October 31, 1985 hearing. Pursuant to a court order, the Trustee resold the authority for $5000.00.

After a two day trial, I held for the Plaintiff, finding that Central Transport and TFL improperly withdrew from the purchase agreement and were still obligated to the Trustee for the purchase price of the Intrastate Authority. I further found that Central Transport was not relieved of liability under the contract. Damages were set at $227,500.00. The damage award was arrived at by taking the purchase price of $310,000.00, for which the Defendants were liable, and subtracting the $5000.00 gained by the Trustee upon resale, and subtracting the $77,500.00 initial payment made by the Defendants and retained by the Trustee.

The Defendants appealed my decision, eventually, to the Sixth Circuit Court of Appeals, who affirmed my decision as to Central Transport's liability under the agreement but remanded the case for consideration of whether the withdrawal was proper under paragraph 2(f) of the contract and for interpretation of other contract provisions. The Sixth Circuit stated that this Court should determine the following:

> Is paragraph 5 a condition precedent to paragraph 2(f)? If so, was the condition met so that central had the right to exercise paragraph 2(f)? If Central had the right to exercise paragraph 2(f), what was the time in which it had to exercise its option under 2(f)? Did it

exercise its option to complete the sale under that paragraph by continuing to seek approval of the transfer after February 5, 1985? If not, did Central's notice of termination on September 30, 1985 constitute notice within a reasonable time?

> If paragraph 5 is not a condition precedent or was satisfied, so that Central had the right to exercise the options contained in paragraph 2(f), what was the time in which it had to exercise its option under 2(f)? Did it exercise the option to complete the sale by continuing to seek approval for the transfer after February 5, 1985? If not, did Central's notice of termination on September 30, 1985 constitute notice within a reasonable time?

Walhout v. TFL, Inc. (In Re Tucker Freight Lines, Inc.), No. 90-1244, slip op. at 3-4 (6th cir. filed April 15, 1991).

ARGUMENT

On June 5, 1984, at the conclusion of the bidding for Tucker's Intrastate Authority, Mr. Mason, acting for Central Transport, signed a contract to purchase the Intrastate Authority which contained the following provisions:

> 2. . . .
>
> (f) If the transfer of this Authority cannot be completed within eight (8) months from the date of this agreement, the Buyer has the option to complete the sale at a later date, or require that the payment described above be returned.
>
> 5. The Buyer agrees, at its expense, to diligently prosecute the application for the transfer of the Authority and will use its best efforts to secure such transfer.

It is these provisions of the purchase agreement that are again before me for interpretation. The eight month period in paragraph 2(f) expired on February 5, 1985. Central Transport withdrew from the agreement on September 30, 1985.

Appendix D

Central Transport's position is that after the eight month deadline, on February 5, 1985, it acquired the option right to dismiss the transfer proceeding and that its withdrawal on September 30, 1985 was pursuant to this valid right. Central Transport maintains that it diligently sought approval of the transfer application up to the date of withdrawal but that Holland's seeming intransigence caused it to lose hope and give up on seeking approval. Central Transport concludes that it reasonably and legally exercised its rights under paragraph 2(f). As to paragraph 5, Central Transport contends that it is not a condition precedent to the exercise of their option under paragraph 2(f), but that, in any event, Central Transport complied with paragraph 5.

The Trustee lists a variety of reasons for this Court to conclude that Central Transport was in breach of its obligations under the purchase agreement. The Trustee asserts that Central Transport, by its actions, elected under paragraph 2(f) to complete the sale and that, with this choice, lost the right to withdraw. Next, the Trustee argues that Central Transport had only a "reasonable time" after February 5, 1985 to exercise its option and that Central Transport failed to act within such a time period. With respect to paragraph 5, the Trustee maintains that regardless of whether it was a condition precedent, Central Transport breached its best effort requirement and as such should be denied the opportunity to exercise its option under paragraph 2(f). Lastly, the Trustee argues that either waiver, estoppel or laches preclude Central Transport from exercising any right under paragraph 2(f).

Initially, it is evident that the parties did not think very carefully about paragraph 2(f) until late September, 1985. As already noted, Mr. Davidoff, who drafted the contract, did not have much experience in the sale or transfer of authority. Mr. Lech testified at trial that he thought the provision unusual, that he didn't know about it at the time of signing and that he would have gone ahead with the sale without it being in the

contract.[5] Mr. Scopelitis did not even read the contract until after the transfer proceedings were well underway. Because the Defendants were uncertain as to the existence and meaning of paragraph 2(f) and Mr. Davidoff inexperienced in drafting such agreements, it is hard for me to discern a great intent behind the inclusion of the option provision in the contract to purchase the Intrastate Authority. However, parties are bound by what they sign and a right exists under paragraph 2(f) that must now be construed.

DISCUSSION

I. Is Paragraph 5 A Condition Precedent To Paragraph 2(f)?

"A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." RESTATEMENT (SECOND) OF CONTRACTS § 224 (1982). "[C]onditions precedent are not favored and the courts will not construe stipulations to be such unless required to do so by plain, unambiguous language or by necessary implication." 17A AM. JUR. 2d *Contracts* § 471 (1991).

Paragraph 5 of the purchase agreement requires Central Transport to diligently prosecute the application for the transfer of the Intrastate Authority and to use its best efforts to secure such transfer. The express language of paragraph 5 is not conditional. Rather, the mandate of paragraph 5 is in the form of a promise. Under paragraph 5, Central Transport agrees, unconditionally, to diligently prosecute the transfer application and to use its best effort toward successful procurement. No consequence or loss of any right under paragraph 2(f) is expressed for failure on the part of the Defendants to comply with paragraph 5. Since the language of paragraph 5 does not plainly and unambigously declare it to be a condition, the law clearly favors construing this provision to be a promise. 5 Samuel Williston, *A Treatise on the Law of Contracts* § 665 (3d ed. 1961).

Appendix D

Conditions precedent must be stated explicitly. *Krukemeier v. Krukemeier Machine & Tool Co.*, 551 N.E.2d 885, 889 (Ind. App.Ct. 1990). There is a complete absence of any language linking paragraph 5 with paragraph 2(f). Paragraph 5 makes no reference at all to paragraph 2(f). As a result, I find that paragraph 5 is an independent promise on the part of the Defendants.

Although perhaps not necessary for this determination as the express language of paragraph 5 makes clear that it is not a condition precedent, it is nonetheless helpful to note that the silence surrounding the inclusion of paragraph 5 in the contract to purchase favors it being viewed as an independent promise. From reviewing the testimony elicited, it is as if the parties gave no thought to paragraph 5. As already noted, Mr. Davidoff was unfamiliar with drafting such purchase agreements, and neither Mr. Lech nor Mr. Scopelitis seemed aware of the contractual provisions until after signing the agreement.[6] In light of the parties indifference to this part of the contract it would be inappropriate to construe paragraph 5 as a condition precedent to the option rights under paragraph 2(f).

Even with the conclusion that Paragraph 5 is not a condition precedent to Paragraph 2(f), the Plaintiff still maintains that the Defendants' failure to comply with paragraph 5 precludes them from exercising their option under paragraph 2(f). The Plaintiff argues that the Defendants breached their obligation to diligently pursue the transfer application and to use their best efforts. This first, material breach, claims the Plaintiff, prevents the Defendants from later exercising their right to withdraw from the purchase agreement. Plaintiff relies on the rule that a party in breach of contract cannot enforce contract rights, beneficial to him, against the non-breaching party. *See, Lawrence v. Caine,* 245 N.E.2d 663, 667 (Ind.App.Ct. 1969).

I find that Plaintiff's claim is not factually supported. Under paragraph 5, the Defendants were required to use their best efforts to secure approval of the transfer application. A best effort

requirement is not synonymous with successful completion. The Plaintiff argues that by withdrawing its application on the eve of the hearing, Central Transport breached its obligation under paragraph 5. This fact alone is not enough to conclude that Central Transport was in breach of its duties under paragraph 5. A valid exercise of its conditional option rights under paragraph 2(f) would not constitute a breach of paragraph 5. Even if Central Transport invalidly invoked the option under paragraph 2(f), that does not mean, necessarily, that the defendants failed to diligently pursue approval before the PSCI. Breach of contract could occur under paragraph 2(f) without the conclusion that the defendants failed to use their best efforts to secure the transfer of the Intrastate Authority.

There is no indication that Central did not pursue the approval of the transfer vigorously. The Defendants continued to seek and obtain grants of temporary authority, which improved the likelihood of success in obtaining permanent approval. Further, Mr. Scopelitis, the attorney pursuing approval before the PSCI, was in continual contact with the Defendants, updating them on the progress of the application, the chances of it being approved, and the means that should be adopted to ensure approval.

The fact that the hearing before the PSCI was delayed, even often, is not enough to determine that Central Transport neglected its duty. Delay, if excused, will not trigger the breach of a best effort provision. *Burras v. Canal Construction & Design Co.*, 470 N.E.2d 1362, 1367 (Ind.App.Ct. 1984). From the peculiar nature of the application process in this case, it appears that the Defendants may have been vigorously pursuing approval of the transfer of the Intrastate Authority by allowing delay, and, perhaps, even intentionally causing it. The Senior Vice-President of Central, Mr. Payne, testified that the longer and more substantial the operations under temporary authority, the better the prospect of approval. Transcript Volume II at 86. The dormancy and duplication objections raised by Holland would lessen in

importance if TFL could continue in operation under temporary authority. As already explained, Mr. Scopelitis was aware of this fact when he wrote to the executives of Central Transport that "time was on our side." Rather than amounting to a breach of the best efforts requirement under paragraph 5, the numerous delays in the application process contributed to a greater likelihood of success.

I find that the Defendants did not breach their obligation under paragraph 5 to utilize their best efforts to obtain approval of the transfer. Rather, Defendants, in their knowledge of the transfer process, relied upon hearing delays to further the desired goal. In this way, their best effort was expressed by allowing TFL to build up its operation under temporary authority for the purpose of combatting the allegations of dormancy and duplication.

Paragraph 5 need no longer be considered. It is not a condition precedent to paragraph 2(f), and its best effort and due diligence requirements were not breached. My attention can now focus on paragraph 2(f) and the exercise by Central Transport of the conditional rights provided under it.

II. What Is The Time Frame In Which The Defendants Could Exercise Their Option Under Paragraph 2(f)?

Indiana law regarding contract construction is set forth in the case of *First Federal Savings Bank v. Key Markets, Inc.*, 559 N.E.2d 600 (Ind. 1990). When the contract language can be clearly interpreted, without ambiguity, "[t]he proper posture for the Court is to find and enforce the contract as it is written and leave the parties where it finds them." *Id.* at 604. It is easily discernible from the language of the contract that Paragraph 2(f) is a condition subsequent granting the Defendants an option, upon its occurrence, to either proceed with the transfer application or elect to withdraw from the purchase agreement and obtain a refund of any funds tendered. The condition is triggered and the option right accrues when the transfer cannot be completed

within eight months. Two questions need to be considered in looking at paragraph 2(f). The first question is when Central Transport possessed the right to withdraw. Next, I need to consider how long Central Transport had to elect a course of conduct under the option.

As to the first question, this Court concludes that the option to proceed or to request the return of any payment made did not accrue until after February 5, 1985. Central's option did not arise until the eight month period, after the date of the agreement, passed. Paragraph 2(f) states that "if the transfer of this Authority cannot be completed within eight months" the buyer, here Central Transport, possesses the right to withdraw or to proceed. The word "cannot" means that certainty exists as to the conclusion that something is not possible. Here, certainty of the fact that the transfer will not complete within eight months exists only with the expiration of the time period. The Plaintiff argues that certainty, and therefore the conditional right under the contract, existed before February 5, 1985. This position does not reflect the clear language of the condition. The conclusion that it is not possible for the transfer to be completed within eight months does not arise without any doubt until the period has expired.

Finding that the option right under Paragraph 2(f) does not accrue until after February 5, 1985 also comports with sound contract interpretation. To rule in accordance with the Plaintiff's argument would force the Court to determine a date when the degree of certainty rose to such a level as to preclude the possibility that the transfer would still be accomplished within the eight month period. That would be a nebulous consideration, impossible of exact determination. It is only after February 5, 1985 when it can be concluded with total certainty that the transfer cannot be completed within the eight month period.

Further, my interpretation of when the option period begins enables a clear understanding between the parties to exist. Otherwise, the agreement would call for each party to independently balance degrees of certainty as to when the transfer could not be

accomplished within eight months. Conflicting results would certainly occur and no one would know conclusively when the option right existed until the matter was brought before a court. Paragraph 2(f) should be interpreted to avoid the necessity of a litigious resolution as to when rights accrue and should be interpreted to promote a clear understanding between the parties that encourages like-mindedness. With that in mind, I find that the option right under paragraph 2(f) accrued only after February 5, 1985.

Next, I need to consider the length of the option period. Again, the *Key Markets* case controls my consideration. "It is the duty of the courts to interpret a contract so as to ascertain the intent of the parties." *First Federal Savings Bank v. Key Markets, Inc.*, 559 N.E.2d at 603. The agreement between the parties is silent as to the length of the option period. Paragraph 2(f) only grants the Defendants the choice to withdraw or to proceed. It does not set forth the time in which the Defendants must choose which course to follow. What is remarkable about this case is the absence of evidence as to the intent of the parties. The Defendants proceeded with the transfer seemingly unaware of the existence of Paragraph 2(f), while the Plaintiff's attorney, who wrote the agreement, professed an inexperience in drafting such contracts for the purchase of shipping authorities. There is an absence both in the agreement itself and in the trial record as to the duration of the Defendants' right. "Where there is no provision as to the time of performance, a reasonable time is implied." 17A AM. JUR. 2d *Contracts* §479 (1991). This result is accepted under Indiana law. *See, Grand Lodge Hall Ass'n, I.O.O.F. v. Moore,* 70 N.E.2d 19, 22 (Ind. 1945). The briefs submitted by each party also reach this conclusion.[7] Based upon the concurrence of all these sources, I can easily find that the Defendants possessed a reasonable amount of time after February 5, 1985 to decide whether to exercise their right to withdraw.

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III. Did Central's Notice Of Termination On September 30, 1985 Constitute Notice Within A Reasonable Time?

What constitutes a reasonable amount of time depends on "the subject matter of the contract, the situation of the parties and the circumstances attending performance." *Jay Clutter Custom Digging v. English,* 393 N.E.2d 230, 232 (Ind.App.Ct. 1979).

Applying the facts of this dispute to the considerations outlined in the case just cited, it must be concluded that Central Transport did not provide notice of its intent to withdraw within a reasonable time after February 5, 1985. Rather than give an exact date as to when notice should have been given, I find that from the facts and circumstances of this case, the Defendants did not act within a reasonable time period. *See, FOP Lodge No. 52 v. Civil City,* 551 N.E.2d 469, 472 (Ind.App.Ct. 1990). By waiting until September 30, 1985, on the eve of hearing before the PSCI, Central Transport failed to exercise their right under paragraph 2(f) within the reasonable time period provided to them.

The contract entered into by the parties for the sale of the Intrastate Authority did not establish a time period in which the Defendants could exercise their option right. I have found that a reasonable time period should be imputed to paragraph 2(f)'s provision. Now, I hold that this Court should adopt a conservative approach in determining what constitutes a reasonable amount of time.

As I have noted earlier, the parties gave little thought to the written document embodying the sale accomplished at the auction. The purchase agreement was signed shortly after the auction at the insistence of the Trustee. There was no negotiation behind the drafting of paragraph 2(f). The Defendants were so familiar with the transfer process that they proceeded with their application before the PSCI without much thought about the purchase agreement. Central Transport's executive Vice-President, Mr. Ronald Lech, testified that he did not know of the existence of the option provision at the time the contract was signed or

shortly thereafter. Further, Mr. Lech testified that he did not request the inclusion of that provision, and that he found it unusual and would have gone ahead with the sale without it. Central Transport was initially skeptical about paragraph 2(f) as they thought the withdrawal right could be exercised by either party. These facts and circumstances compel a restricted interpretation of the length of the reasonable period that Central Transport had to act. With neither party placing emphasis on paragraph 2's inclusion in the purchase agreement, it would be inappropriate to allow the Defendants to have an expanded right to walk away from the agreement long after the signing and even long after the eight month period expired.

The Defendants argue that, through a more expansive reading of paragraph 2(f), their withdrawal on September 30, 1985 came within a reasonable time after February 5, 1985. Central Transport bases its contention on the rule that an agreement and its provisions should be construed against the drafter. *Wabash Ford Truck Sales, Inc. v. Ford Motor Company,* 472 N.E.2d 611, 614 (Ind.App.Ct. 1984). Despite this rule, I cannot find that it was reasonable under paragraph 2(f) for Central Transport to persevere with its application past February 5, 1985, through numerous delays, and then, nearly eight months later exercise a right to withdraw that neither side ever considered very important or gave much thought to.

The purpose of the agreement was to reduce to writing the results of the auction sale. The sale was the result of a court order allowing the liquidation of the Debtor's assets. A lingering right to renounce their purchase at the auction could not have been in the minds of the parties. Central Transport was experienced in the purchase and transfer of intrastate authorities. The Trustee's position was to secure the maximum benefit for the Bankruptcy Estate. Both desired at the outset to expeditiously accomplish approval of the transfer by the PSCI.[8]

The option allowed the Defendants to pursue the transfer for eight months and then consider their chances for success. The

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Defendants had the right, at the end of the eight month period, to assess the situation. If the prospect of approval was slim, fraught with objections, and would be drawn out, the Defendants were given the right to withdraw. But, if after eight months, the Defendants found that approval could be obtained with continued effort, then they could elect to proceed with the application before the PSCI. The Defendants possessed a beneficial option that would allow them to withdraw if the transfer process became inexpedient. Even though beneficial to the Defendants, the option cannot be viewed as allowing the Defendants to drag out their consideration of which path to elect, and then abandon their purchase at a later date forcing the estate to absorb the cost of resale and possible losses. Rather, the option period should last for a length of time appropriate for the Defendants to determine whether continued pursuit or withdrawal is more appropriate. The option under paragraph 2(f) needed to last for a reasonable time to enable the Defendants to evaluate and determine which course to follow. Under paragraph 2(f), reasonable time means time sufficient to determine which option right to exercise; withdrawal from the agreement because continued pursuit would be fruitless, or completion of the transfer process.

Central Transport was experienced in the transfer process. The reasonable time necessary for them to determine whether to withdraw from the purchase agreement would not be long. Within a short period of time after February 5, 1985 Central Transport should have been able to assess the prospects for successful completion of the application before the PSCI. Much of the correspondence between attorney Alki Scopelitis and the officers of Central Transport concerned predictions about the likelihood of approval. Central Transport did not need to wait through numerous delays, until the eve of a hearing that finally appeared ready to take place, to conclude that it should abandon its offer to purchase the Intrastate Authority.

Since February 5, 1985 only one objection to transfer existed. No new ones arrived to complicate consideration. Central Trans-

port knew of the objection to dormancy and duplicity and knew how best to combat it. Central Transport did not need a long period after February 5, 1985 to consider and plan. The letters of Alki Scopelitis reflect that their approach to obtaining approval was established and their awareness of the obstacles to transfer complete. The amount of time Central waited to withdraw was not reasonable in light of the decision that the option entitled them to make. Central Transport needed only to decide which was the more expedient course. Central Transport had all the facts before them on February 5, 1985 and should have been able to arrive at a choice before late September, 1985.

In construing Paragraph 2(f), I must arrive at an understanding of what constitutes a reasonable time for the Defendants to exercise their option to withdraw that harmonizes all the provisions of the purchase agreement. *First Federal Savings Bank v. Key Markets, Inc.*, 559 N.E.2d at 604. Paragraph 2(f) does not purport to endow the Defendants with the ability to postpone exercising their option right until they are sure which course of action would be better. It does not enable the Defendants to wait until the eve of the hearing and only then conclude that obtaining approval is without hope and walk away from its agreement. While I have found that Central diligently pursued its transfer application, a time came when it had committed itself to benefitting from the delay in the hearing process as part of its effort to secure approval, and where it would be unreasonable to allow the Defendants to utilize an option, given only little consideration in the drafting and signing of the purchase agreement, to withdraw from its obligation.

By not exercising their option right within a reasonable time, the Defendants were in breach of contract when they attempted to withdraw from the purchase agreement. This being so, I concur with the result I reached at trial back in 1988.

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IV. Did The Defendants Exercise Their Option To Complete The Sale At A Later Date By Continuing To Seek Approval For The Transfer After February 5, 1985?

Once the February 5, 1985 deadline passed, Paragraph 2(f) provided the Defendants with an option to proceed with the transfer application or withdraw from the process. By electing one course of action, the Defendants are precluded from exercising the alternative right at a later date. The Defendants could not elect under paragraph 2(f) to "complete the sale at a later date" and then withdraw from its offer. Two, inconsistent, rights are provided by paragraph 2(f). The Defendants could elect to complete the sale or to withdraw. By electing to complete the sale, Central Transport becomes committed to securing approval of the transfer to the exclusion of their right to withdraw. Paragraph 2(f) cannot be understood to mean that the Defendants' election under paragraph 2(f) does not become binding until completion actually occurs. By electing the right to continue, the Defendants necessarily surrender the other, inconsistent, right to withdraw. 5 Samuel Williston, *A Treatise on the Law of Contracts* § 683 (3 ed. 1961). Here, by their conduct, I find the Defendants elected to continue to seek approval of the transfer and therefore surrendered any right under Paragraph 2(f) to withdraw from the purchase agreement.

The conclusion that Central Transport, by its conduct, elected to pursue completion of the transfer process must be based on actions occurring after the February 5, 1985 deadline, for it is only after that date that the Defendants possessed a right to exercise. Ample evidence exists before February to indicate that the Defendants had decided on a strategy of delay and were committed to seeking approval even after February 5, 1985. On December 14, 1984, Mr. Scopelitis, who was representing the Defendants, wrote to the Senior Vice-President, Mr. Payne, informing him that he would try to get the hearing on approval set for as late as possible in the spring of 1985. This date would have been beyond the February 5, 1985 deadline.

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But, the affirmative and exclusive election under Paragraph 2(f) could not be made until after the Defendants possessed the option right. Evidence does exist that even after February 5, 1985, Central Transport was committed to securing approval of the Intrastate Authority before the PSCI. On June 26, 1985, Mr. Scopelitis, in another letter to Mr. Payne, this time in the "P.S." to his correspondence, commented on how best to handle the remaining objection of Holland and remarked that "we can keep this matter going for quite a long time, as we already have." The testimony of the parties reflect and the facts are conclusive that even after the eight month deadline, Central Transport remained committed to securing approval before the PSCI by waiting out the remaining disputant. This conduct amounts to an election under Paragraph 2(f) to continue pursuing approval to the exclusion of their right to withdraw. Mr. Scopelitis believed that successful transfer could be achieved and acted in accordance with this belief after the eight month deadline expired. The conduct of the Defendants and of Mr. Scopelitis reflect that they were not retaining the right to withdraw at a later date, but were committing themselves to seek approval of the transfer application.

Based upon these facts, I find that the Defendants exercised their option under Paragraph 2(f) to seek approval of the transfer application and as such were precluded from exercising the right to withdraw. The Defendants were in breach of contract by their actions in late September, 1985. Damages should be and are awarded in the amount of $227,500.00 as decided at trial in 1988.

With this decided, it is not necessary to consider the other grounds for relief, namely waiver, estoppel and laches, argued by the Plaintiff. Such equitable remedies are not required when the result is clear at law and from contract interpretation. It should suffice to reiterate that I had found that the Defendants voluntarily waived their right to withdraw under Paragraph 2(f) at the previous trial, but that the Sixth Circuit remanded this case for consideration of the issues of contract interpretation.

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V. Prejudgment Interest

In the case of *Scrima v. Insurance Company of North America, (In Re Scrima),* 119 B.R. 539 (Bankr. W.D. Mich. 1990), I held that the award of prejudgment interest is a matter controlled by state substantive law when the bankruptcy court is called upon to determine a state law cause of action. This decision was grounded upon the Sixth Circuit's decision in *American Andoco, Inc. v. Reynolds Metal Co.,* 743 F.2d 417 (6th cir. 1984) where the court stated that "[i]n diversity cases, federal courts follow state law on the question of prejudgment interest." *Id.* at 425. The Trustee brought his action against the Defendants alleging, essentially, breach of contract and demanding legal and equitable remedies. In deciding this adversary proceeding, I have been guided solely by Indiana law. With this in mind, I now hold that prejudgment interest is available to the Plaintiff from October 1, 1985 at the rate of eight percent (8%) in accordance with Ind. Code Ann. 24-4.6-1-103 (Burns 1991). The award of prejudgment interest serves to fully compensate the Plaintiff for the damage caused by the Defendants' actions. Post-judgment interest is awarded from the date of judgment as provided by 28 U.S.C. § 1961. The Federal rate for post-judgment interest is now at 5.42%.

VI. Attorney Fees

Finally, the Plaintiff requests that I award attorney fees to them in the final computation of damages. Paragraph Six of the purchase agreement provides that:

> Buyer shall pay all attorney's fees and expenses in connection with the filing and prosecution of a Petition for Exemption or application for the approval of the transfer of the Authority contemplated by this agreement.

Attorney fees are provided in only two specific situations under the language quoted above. First, paragraph 6 requires the buyer to pay all attorney fees in connection with the filing and

prosecution for a petition for exemption. Next, the buyer must cover all attorney fees in connection with the application for the approval of the transfer of the authority. Obviously, this case does not concern a petition for exemption. Further, it would be an unwarranted stretch to conclude that attorney fees, arising from this litigation, were contemplated in the provision for attorney fees in connection with the approval of a transfer application. The dispute before me is an action for breach of the entire purchase agreement. Paragraph six must be limited to expenses arising directly from the process of seeking approval before the PSCI. This breach of contract suit arises only indirectly from the application for the approval of the transfer. The contract to purchase the Intrastate Authority does not expressly provide for the award of attorney fees to the Plaintiff in this instance and as such I now deny the Plaintiff's request for them.

Generally, courts disfavor awarding attorney fees. "The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1966). This rule coupled with the language of the purchase agreement lead to the conclusion that the Plaintiff is not entitled to the award of attorney fees.

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CONCLUSION

This Court now finds that Central Transport improperly invoked the right to withdraw expressed in paragraph 2(f) of the purchase agreement. Central Transport failed to exercise its right within a reasonable time, and was further precluded from withdrawing as they had already, by their conduct, elected to complete the transfer of the Intrastate Authority. The Trustee is entitled to judgment against the Defendants with damages awarded at $227,500.00 plus prejudgment interest as provided by Indiana law and post-judgment interest under 28 U.S.C § 1961. The Trustee is denied attorney fees.

Honorable Laurence E. Howard
United States Bankruptcy Judge

Dated: October 25, 1991

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ENDNOTES

1. Although not essential to our determination, it appears that Mr. Scopelitis represented at least the Defendants and perhaps the Trustee in accomplishing the transfer of the Intrastate Authority. Mr. Scopelitis was certainly the attorney responsible for pursuing approval of the transfer application before the Public Service Commission of Indiana. Mr. Scopelitis had extensive experience in his field, having practiced before the Interstate Commerce Commission for 20 years. On June 8, 1984, Mr. Scopelitis sent a letter to Ronald Lech, Executive Vice-President of Central Transport, outlining the problems that could occur in getting the transfer approved.

2. In a letter written on June 22, 1984, Mr. Scopelitis, the attorney and incorporator of TFL, informed James Payne and Ronald Lech, two officers of Central, that their approach toward getting the transfer approved needs to be carefully planned and executed in order to achieve success.

3. The Sixth Circuit affirmed the holding of my previous decision that Central Transport was still liable under the purchase agreement. The issue of whether Central Transport was relieved of liability by the substitution of TFL is not in dispute at this time.

4. On direct examination of Mr. Payne by Mr. Murphy the following took place:

> Q It was part of the purchaser's strategy in this case to operate TFL or to allow TFL to operate using the Tucker authority on a temporary basis for as long as possible; is it true?
>
> A No

Transcript Volume II at 73. In Mr. Berry's cross-examination of Mr. Lech, this testimony was elicited:

> Q Did you do anything to slow down the process of the application within the State of Indiana for the intrastate authority?
>
> A Absolutely not.

Q Did you instruct anyone to do anything to slow down that process?

A No.

Transcript Volume II at 236-37.

5. Transcript Volume II at 207-10. What is apparent from this portion of Mr. Lech's testimony is that he really didn't know about the option expressed in paragraph 2(f) at the outset of the transfer proceedings. Even after he became aware of it, he still did not understand it to be a provision granting Central a beneficial option to withdraw and expressed that he disliked it being in the contract. Mr. Lech believed it to be a two-way option, initially. Transcript Volume II at 223.

6. I have already noted the testimony of Mr. Lech to the effect that he was not aware of the import of paragraph 2(f) until after substantial work had begun on securing approval of the transfer application. The deposition of Mr. Scopelitis, introduced at trial, also reveals that he was unfamiliar with the contract at the time of signing. In answering a question from Plaintiff's counsel Mr. Scopelitis stated:

> I had never seen the contract, so I can't even begin to answer a question as to why or how, rather the contract became the subject of the application because I never saw the contract. When I filed the application, there was no nexus between the contract and the application in my mind because I never saw it.

Transcript Volume II at 143-44.

7. Trial Brief of TFL, Inc. and Central Transport, Inc. at 11 provides that their option right pursuant to paragraph 2(f) existed for a reasonable period of time. Plaintiff's Trial Brief (On Remand) at 16 reaches the same conclusion.

8. Transcript Volume II at 237. Here, Mr. Lech testifies about the strength of his commitment to accomplishing the transfer of the Intrastate Authority successfully and without delay.

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

IN RE:

TUCKER FREIGHT LINES, INC.,
Debtor.
_____/

Case No.
HK 83-02391

JOHN R. WALHOUT, Trustee,
Plaintiff,

—vs—

TFL, INC. and CENTRAL TRANSPORT, INC.,
Defendants.
_____/

Adversary
Proceeding
No. 85-0767

ORDER

At a Court of Bankruptcy held in and for the Western District at Grand Rapids, Michigan, on October 25, 1991.

PRESENT: HONORABLE LAURENCE E. HOWARD
UNITED STATES BANKRUPTCY JUDGE

An Opinion regarding the motions raised having been rendered,

IT IS HEREBY ORDERED THAT:

1. The text of the Opinion is incorporated by reference and made part of this order;

2. Judgment is entered in favor of the Plaintiff in the amount of $227,500.00. Pre-judgment interest is awarded as provided by Indiana law at the rate of eight percent from October 1, 1985. The amount of pre-judgment interest equals $135,412.88. Post-judgment interest will accrue from the date of judgment at the rate of 5.42% as provided by 28 U.S.C. §1961;

3. The Plaintiff's request for attorney fees is denied;

4. A copy of this Opinion will be served upon David Murphy, Pepper, Hamilton & Scheetz, Attorney for the Plaintiff and Simpson Moran by: Patrick A. Moran, Daniel F. Berry, Eric Parzianello, Attorneys for the Defendants.

Honorable Laurence E. Howard
United States Bankruptcy Judge

Served as Ordered
10/28/91 Dlb

Supreme Court, U.S.
FILED
SEP 8 1993
OFFICE OF THE CLERK

No. 93-240

In The

Supreme Court of the United States

October Term, 1993

TFL, INC. and CENTRAL TRANSPORT, INC., jointly and severally,

Petitioners,

vs.

JOHN WALHOUT, Trustee of Tucker Freight Lines, Inc.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should deny certiorari in a breach of contract case where the Bankruptcy Court, the District Court and the Court of Appeals have each twice reviewed it and where there is no clear showing that the Court of Appeals has departed from the accepted and normal course of judicial proceedings.

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INTRODUCTION

There are several reasons why this Court should deny the Petition. First, there is no clear showing that the Court of Appeals has departed from the accepted and normal course of judicial proceedings or sanctioned such a departure by a lower court to call for an exercise of this Court's power of supervision. Second, there is no showing that the Court of Appeals failed to apply the Indiana law, applicable to the case, in the manner that the highest court of Indiana would have applied it. The Court of Appeals, and the Courts below, have interpreted the contract to require the exercise of Petitioners' option within a "reasonable" time. The determination as to what period of time was a "reasonable" time and as to whether Petitioners exercised their option within that reasonable time are factual issues decided below in Respondent's favor. There is no claim that these findings of fact are clearly erroneous. This Court should not be called upon to decide the facts in this case. Third, the case of *Haney v. Estate of Denny*, 193 N.E.2d 648 (Ind. App. 1963) relied on by Petitioners is not applicable.

The Bankruptcy Court's judgment in this case has been twice reviewed by the District Court and twice reviewed by the Court of Appeals. After such exhaustive review, there is no compelling reason for further appellate review or supervision in this matter.

COUNTERSTATEMENT OF THE CASE

A. Facts

On September 14, 1983, Petitioner Central Transport, Inc. ("Central") acquired all of the shares of Tucker

Freight Lines, Inc. ("Tucker"). The next day, Tucker filed a Voluntary Petition under Chapter 11 of the Bankruptcy Code. Central installed its people as officers of Tucker to operate the company as debtor in possession. In January 1984, a Chapter 11 Trustee was appointed. Ultimately, the Chapter 11 case failed, Tucker ceased operations and the Chapter 11 Trustee began to liquidate Tucker's assets.

On June 5, 1984, Central purchased Tucker's Indiana Intrastate Operating Authority (the "Intrastate Authority") at a public auction sale conducted by agents employed by the Chapter 11 Trustee. Central signed a contract (the "Agreement") to purchase the Intrastate Authority, which in part provided:

> 2(f). If the transfer of the [Intrastate] Authority cannot be completed within eight (8) months from the date of this agreement, the buyer has the option to complete the sale at a later date or require that the [deposit] be returned.

Petitioner Central then caused Petitioner TFL, Inc. ("TFL") to be incorporated in Indiana. Central transferred its rights under the Agreement to TFL. TFL, as required by Indiana law, filed an application with the Indiana Public Service commission ("PSC") seeking approval of the transfer of the Intrastate Authority to it. Objections to the transfer application were filed by four other trucking companies. A hearing date on the transfer application was set for mid-December, 1984. Petitioners then embarked upon a strategy of delaying the PSC hearing on whether or not the Intrastate Authority could be transferred by Tucker's bankruptcy trustee to Central or TFL.

In December 1984, the Petitioners caused an adjournment of the PSC's hearing on approval of the transfer of the Intrastate Authority to a date after February 5, 1985, which was the date the eight month deadline specified in paragraph 2(f) of the Agreement expired. Between December and September 30, 1985, Petitioners continued to implement their strategy of delay, albeit for the purposes of increasing the probability of ultimately completing the sale of the Intrastate Authority at a later date. During this period, Petitioners did not exercise their option to have their deposit returned or otherwise to withdraw from the contract. A hearing on the transfer application was ultimately scheduled before the PSC for October 1, 1985. On September 30, 1985, the day before the PSC hearing, Petitioners – without warning, explanation or reason – withdrew from the Agreement. The PSC proceedings, pursued by Petitioners for more than a year to complete the sale of the Intrastate Authority to them, were dismissed by the PSC a month later at Petitioners' insistence.

Respondent commenced an adversary proceeding in the United States Bankruptcy Court for the Western District of Michigan (the "Bankruptcy Court") seeking, among other things, to recover damages for Petitioners' breach of the Agreement to purchase the Intrastate Authority. After a trial on August 31 and September 1, 1985, the Bankruptcy Court ruled in Respondent's favor and awarded a judgment of $227,500 plus interest and costs. The United States District Court for the Western District of Michigan (the "District Court") affirmed the Bankruptcy Court's judgment. Petitioners then appealed to the United States Court of Appeals for the Sixth Circuit

(the "Sixth Circuit") which, on April 15, 1991, affirmed in part and remanded in part.

B. The Bankruptcy Court's Opinion On Remand From The Sixth Circuit

On remand from the Sixth Circuit, the Bankruptcy Court followed the instructions of the Sixth Circuit (Pet. App. 20a – 21a). The Bankruptcy Court concluded, after applying Indiana law (Pet. App. 26a), that (a) paragraph 5 was not a condition but that (b) paragraph 2(f) of the Agreement conditionally granted the Petitioners an option to either proceed with the transfer application or elect to withdraw from the Agreement, with the condition being triggered and the option right accruing when the transfer of the Intrastate Authority could not be completed within eight months. Because the Agreement did not provide a time for the exercise of the option contained in paragraph 2(f), the Bankruptcy Court concluded, applying Indiana law, that "where there is no provision as to the time of performance, a reasonable time is implied." The Bankruptcy Court then made a factual decision that Petitioners' notice of cancellation of the Agreement almost eight months after the option arose and on the eve of the PSC hearing was not an exercise of their option "within a reasonable time". The Bankruptcy Court also concluded that by not exercising its option to withdraw within a reasonable time, by attempting to withdraw at an unreasonable time, the Petitioners had breached the Agreement. The Bankruptcy Court further concluded that Petitioners' conduct demonstrated a commitment to complete the sale of the Authority at a later

date by attempting to secure PSC approval of the transfer, which amounted to an election to complete the transfer at a later date. On October 25, 1991, the Bankruptcy Court again awarded Respondent a judgment for $227,500 plus interest and costs.

C. The District Court's Decision

Petitioners appealed the Bankruptcy Court's decision to the District Court. On March 24, 1992, the District Court affirmed the Bankruptcy Court.

In their appeal to the District Court, the Petitioners did not raise as an issue on appeal whether the Bankruptcy Court had properly applied Indiana law, but instead raised four other issues. (Pet. App. 6a). The District Court noted that the Bankruptcy Court addressed the questions raised by the Sixth Circuit in response to the Petitioners' prior appeal of the Bankruptcy Court's initial decision. The District Court concluded that the Petitioners were required to exercise their option within a reasonable time and that it was not clearly erroneous for the Bankruptcy Court to hold that Petitioners had failed to exercise their option within a reasonable time. Further, the District Court agreed with the Bankruptcy Court that pursuing one of two inconsistent alternatives constituted an exercise of the option, describing the Bankruptcy Court's decision as "sound." The District Court said "[w]here a party to an option contract elects to perform, the alternative, inconsistent option to terminate is lost." (Citation omitted).

D. The Sixth Circuit's Decision

The Sixth Circuit panel which reviewed this case included two members of the panel who had sat on the Sixth Circuit panel in review of the Petitioners' first appeal to the Sixth Circuit (Chief Judge Merritt and Circuit Judge Ryan).

The Sixth Circuit believed "that the withdrawal provision in Section 2(f) means the buyer had a reasonable period of time after the initial deadline period expired in which to exercise its option to withdraw." (Pet. App. 4a). It concluded that the Petitioners should not have waited for as long as they did to attempt to exercise their option to withdraw because their obligation "was either to exercise [their] option to withdraw within a relatively short period of time after the initial period expired or to pursue diligently the transfer of authority through the Public Service Commission proceeding." Although the Sixth Circuit's opinion does not cite to any authority, it had before it the briefs of the parties and the lower court opinions. Those briefs and opinions cited and relied upon Indiana case law. The Sixth Circuit accordingly affirmed the judgment of the District Court.

SUMMARY OF ARGUMENT

In the exercise of its discretion, this Court should deny the Petition. Despite Petitioners' attempts to argue that the Sixth Circuit has "so far departed from the accepted and normal course of judicial proceedings, or

sanctioned such a departure by a lower court", by claiming that it did not apply Indiana rules of contract interpretation in the manner in which the Indiana Supreme Court would apply them, there is simply no evidence that the Sixth Circuit failed to properly review the matter. The lower courts' opinions clearly applied Indiana law, including decisions regarding contract interpretation rendered by the Indiana Supreme Court.

Petitioners' reliance on *Haney v. Estate of Denny*, 193 N.E.2d 648 (Ind. App. 1963) is misplaced. Although *Haney, supra*, may be good law, it is inapposite to the case at bar because that court dealt with an inchoate option while in the case at bar, Petitioners' option was a choate option; it arose at the expiration of the initial eight month period.

The Bankruptcy Court, the District Court, and the Sixth Circuit have each twice reviewed this matter. There has been a complete and thorough review of the facts and the law. Petitioners simply cannot sustain the heavy burden of demonstrating that the Sixth Circuit has departed from the normal course of judicial proceedings sufficient to demand an exercise of this Court's jurisdiction.

ARGUMENT

Reasons For Denying A Writ Of Certiorari

A. The Sixth Circuit Did Not Depart From The Accepted And Normal Course Of Judicial Proceedings So As To Call For An Exercise Of This Court's Powers

Petitioners argue that the Sixth Circuit failed to properly apply Indiana law and that such failure constitutes a

departure from the accepted and normal course of judicial proceedings to call for an exercise of this Court's power of supervision. (Pet. v). As an even cursory review of the Sixth Circuit, District Court, and Bankruptcy Court opinions shows, the lower courts all applied Indiana law as it was presented to them by the parties. The Sixth Circuit did not disregard any applicable ruling by an Indiana court.

Petitioners cannot seriously challenge the unanimous determinations that the law in Indiana is that the Petitioners had to exercise their option to withdraw within a reasonable time after the option accrued, as set forth in *First Federal Savings Bank v. Key Markets, Inc.*, 559 N.E.2d 600 (Ind. 1990). That is the law applied by the Bankruptcy Court, the District Court and the Sixth Circuit. In fact, the District Court explicitly stated that the parties agreed that this is the law, and Petitioners have not appealed this conclusion of law.

Applying that law, the Bankruptcy Court made a finding of fact that Petitioners had not exercised their option within a reasonable time. "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of the witnesses." Bankruptcy Rule 8013. Petitioners do not here contend that there were any erroneous factual findings.

Neither can Petitioners seriously contend that the lower courts did not appropriately apply controlling law from intermediate state courts. For example, the courts below based their decisions in part on *Fraternal Order of Police Lodge No. 52 v. Elkhart*, 551 N.E.2d 469 (Ind. App.

1990) or *Jay Clutter Custom Digging v. English*, 393 N.E.2d 230 (Ind. App. 1979) with regard to defining the standard for determining "reasonable" time. Both the Bankruptcy Court and the District Court explicitly relied on these cases. The Sixth Circuit determined that the lower courts appropriately interpreted the contract to mean that Petitioners had a reasonable – as apposed to open-ended or indefinite – period of time to withdraw, and that Petitioners had waited too long to attempt to withdraw, implicitly endorsing the lower court's application of the law set forth in those two Indiana cases.

B. The Court Of Appeals And The Lower Courts Did Not Misinterpret The Plain Language Of The Agreement

The Agreement provided that the Petitioners could, upon the occurrence of a condition, either withdraw from the Agreement or choose to complete the sale at a later date. Applying Indiana law (see Argument A), the lower courts determined that, because Petitioners did not elect to withdraw from the Agreement within a reasonable time, Petitioners lost that right. Therefore, by default Petitioners elected the other prong of the option – to complete the sale at a later date. Whether the completion of the sale at a later date is described as an option to "continue" to pursue the sale, or "to pursue diligently the transfer", the result remains the same. Foregoing one alternative compelled Petitioners to accept or to exercise the other alternative. The District Court said:

> The two alternatives are inconsistent. Within a reasonable time of February 5, [Petitioners] could either terminate the agreement or proceed

> with the sale. They could not do both. Where a party to an option contract elects to perform, the alternative inconsistent option to terminate is lost. *Corbin On Contracts*, Section 264.

(Pet. App. 11a, 12a). As the District Court said, and as the Court of Appeals affirmed, "by not terminating the contract sooner and continuing to pursue the transfer, [Petitioners] chose the second option", being to complete the transfer at a later date. Petitioners, however, failed to pursue the other prong of the option when, without warning they withdrew from the Agreement and thereafter dismissed the proceedings.

C. *Haney v. Estate of Denny* Does Not Apply And The Court of Appeals Properly Did Not Apply It

Respondent does not quibble with the proposition that *Haney v. Estate of Denny*, 193 N.E.2d 648 (Ind. App. 1963), claimed by Petitioners to be controlling here, is good law. Rather, Respondent points out that the case is simply not applicable to the facts of this case. There, the court found that Haney could not exercise an option because it had not yet ripened. Petitioners claim that they were precluded from exercising their option to complete the sale at a later date because their option had not ripened. Unfortunately for Petitioners, this is simply not true. In the case at bar, the lower courts determined that Petitioners' option "ripened" on February 5, 1985, the expiration of the eight month period set forth in Section 2(f) of the Agreement. Because the option to withdraw was ripe, *Haney v. Estate of Denny, supra*, is inapplicable. Being inapplicable, the Court of Appeals should not have,

and correctly did not, apply it in this case. The courts further determined (and the parties agreed) that Petitioners were required to exercise the option within a "reasonable" period of time after February 5, 1985. Petitioners here do not challenge the conclusions that the option was ripe in February 1985 or that it must be exercised in a reasonable time. Rather, Petitioners indirectly attack the conclusion that an attempted election almost eight months later was not within a reasonable time under the circumstances. Although they attempt to frame the issue as a legal issue, it is a factual issue and this factual finding is not clearly erroneous. Therefore, this Court should deny the Petition.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court deny the Petition For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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